Dato Wira A Nordin bin Mohd Amin & Ors v Rajoo a/l Selvappan & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M–02–1145 OF 2005
DENIS ONG, JAMES FOONG AND ZALEHA ZAHARI JJCA
31 MAY 2007

Civil Procedure — Parties — Joinder of parties — When time starts to run for purposes of joinder — Appeal against decision allowing respondents' application to add appellants to existing action — Whether respondents' application statute barred — Whether such action would fail in limine — Whether application should have been refused — Limitation Act 1953 ss 6(1)(a), 22(2) — Rules of the High Court 1980 O 15 r 1

Civil Procedure — Pleadings — Limitation — Application to add appellants to existing action — Whether relevant provision of Limitation Act must be pleaded in the pleading subsequent to statement of claim — Whether appellants already defendants in action and obliged to file a statement of defence — Rules of the High Court 1980 O 18 r 8(1)(a)

Limitation — Pleading, amendment of — Defence of limitation — Appeal against decision allowing respondents' application to add appellants to existing action — Applicability of s 22(1)(a) — Period of limitation for breach of trust and tort of conspiracy — Whether s 22(1) and 22(2) in conflict and inconsistent — Whether application should have been refused — Limitation Act 1953 ss 6(1)(a), 9, 21, 22

The appellants were advocates and solicitors and partners of Messrs Nordin & Phua. The respondents/plaintiffs and some other third parties were all registered proprietors of undivided shares of a piece of land held under Grant No 2958, Lot 579, Mukim Ayer Panas, District of Jasin, Melaka ('the said land'). They entered into a sale and purchase agreement to sell in to Astana Strategi (M) Sdn Bhd ('Astana'). Messrs Nordin & Phua were the respondents/plaintiffs' solicitors while Messrs Badaruzaman Chandran & Co ('Messrs Badaruzaman') acted for Astana. All parties to the sale had consented to the issue document of title being deposited with Messrs Nordin & Phua pending the completion of the sale. All the registered proprietors had executed the respective memorandum of transfers of the said land in Astana's favour, which were deposited with Messrs Badaruzaman. As Astana failed to pay the balance purchase price within six months as agreed, Messrs Nordin & Phua wrote to Messrs Badaruzaman to terminate the sale and then released the title to the first to fifth defendants and eighth defendant (a middleman) based on a letter stating that the Committee had asked them to keep custody of the title. The respondents/plaintiffs contended that the first to fifth defendants and eighth defendant had obtained the title from Messrs Nordin & Phua without their knowledge and in breach of trust and forwarded the same to Messrs Badaruzaman who effected the registration of the transfer in favour of Astana, who then charged the land to Southern Finance Bhd as security for loan facilities.

After the third appellant had completed his testimony during the trial in the High Court, the respondents/plaintiffs applied to add the appellants as defendants to the suit for, inter alia, breach of trust and conspiring with the first to fifth defendants and eighth defendant to deprive the plaintiffs of their rights to the said land. The appellants resisted the application and raised the issue of limitation. The High Court judge allowed the respondents/plaintiffs' application to add the appellants as the ninth to eleventh defendants in the case. Hence, this appeal.

Held, allowing the appeal:

(1) Section 9 of the Act concerns the recovery of land as indicated by the heading which reads: 'Limitation of actions to recover land'. As in the proposed amended statement of claim, the respondents did not seek for recovery of the said land. They only requested for damages. So s 9 of the Limitation Act is not applicable to the facts of this case which consist no claim for the recovery of land (see paras 12–13).

(2) There was no conflict or inconsistency between s 22(1) and s 22(2) of the Act. Each of these subsections applies to different set of circumstances. Under sub-s (a) of s 22(1), there must be the element of fraud or fraudulent breach of trust. And under sub-s (b) of s 22(1), the trust property must be in the possession of the trustee or he has in possession of the proceeds thereof. Though breach of trust is alleged to be committed, there is no allegation in the respondents' proposed amended statement of claim, which must be relied on to represent the grounds for inclusion of the appellants as a party to the action, of fraud or for fraudulently breaching the trust. When such elements of fraud or fraudulent breach of trust is absent then sub-s (a) of s 22(1) has no application (see paras 16–17).

(3) For recovery of trust property which is not in the possession of the trustee or for that matter any breach of trust would fall within s 22(2) of the Act, provided that the action so mounted by the beneficiary is not one of those causes of action or situation where a time limit is already prescribed by the Act to bring the action. If a time is so prescribed, then the prescribed period of limitation specified in the Act will apply. Otherwise, it will be six years from the date on which the action accrued. This plea of limitation is only relevant to the respondents' proposed first cause of action: for breach of trust in releasing the document of title. This was in 1996. Thus, time had lapsed for the respondents to seek redress by this action against the appellants. Such action would fail in limine (see paras 16–17).

(4) Section 29 of the Act is not applicable as there is no allegation of fraud ever raised in this case against the appellants and neither is the respondents' proposed claim against the appellants is for relief from the consequence of a mistake (see para 18).

(5) When the claim is one of conspiracy then it falls under the emerging tort of conspiracy to do an act resulting in damage to the claimant. Since this proposed action is brought after this period of six years, it would also fail in limine upon a plea of limitation under this provision of the law (see para 19).

Obiter:

This was only an application to add parties to an existing action. It had not reached the stage where the appellants were already defendants in the action. Not being parties to the action, the appellants were not obliged to file a statement of defence which of course, if they did, it would be necessary for them to disclose the relevant provision of the Act relied on by them. But not having reached this stage of the proceedings as yet they were not required to do so since O 18 r 8(1)(a) of the Rules of the High Court 1980 only stipulates that this is to be done 'subsequent to a statement of claim' (see para 21).

[Bahasa Malaysia summary

Perayu-perayu merupakan peguambela dan peguamcara dan rakan-rakan kongsi Tetuan Nordin & Phua. Responden/plaintif dan beberapa pihak ketiga kesemuanya merupakan tuan punya berdaftar bahagian tidak berbahagi sekeping tanah dipegang di bawah Geran No 2958, Lot 579, Mukim Ayer Panas, Daerah Jasin, Melaka ('tanah tersebut'). Mereka memasuki satu perjanjian jualbeli untuk menjual kepada Astana Strategi (M) Sdn Bhd ('Astana'). Tetuan Nordin & Phua merupakan peguam responde/plaintif manakala Tetuan Badaruzaman Chandran & Co ('Tetuan Badaruzaman') bertindak bagi pihak Astana. Kesemua pihak dalam jualan tersebut telah bersetuju agar surat ikatan dokumen hak milik disimpan oleh Tetuan Nordin & Phua sementara menunggu jualan selesai. Kesemua tuan punya berdaftar telah menyempurnakan memorandum pindah milik masing-masing ke atas tanah tersebut bagi pihak Astana, yang disimpan oleh Tetauan Badaruzaman. Oleh kerana Astana telah gagal untuk membayar baki harga belian dalam tempoh enam bulan seperti dipersetujui, Tetuan Nordin & Phua telah menulis kepada Tetuan Badaruzaman untuk menamatkan jualan tersebut dan kemudian melepaskan hak milik kepada defendan-defendan pertama hingga kelima dan defendan kelapan (orang tengah) berdasarkan sepucuk surat menyatakan bahawa Jawatankuasa telah meminta mereka menyimpan hak milik tersebut. Responden/plaintif menegaskan bahawa defendan-defendan pertama hingga kelima dan defendan kelapan telah memperoleh hak milik daripada Tetuan Nordin & Phua tanpa pengetahuan mereka dan telah melanggar amanah dan mengemukakan yang sama kepada Tetuan Badaruzaman yang telah mendaftarkan pindah milik tersebut bagi pihak Astana, yang kemudian telah mencagarkan tanah tesebut kepada Southern Finance Bhd sebagai sekuriti untuk pinjaman kewangan.

Setelah perayu ketiga selesai membuat pengakuannya semasa perbicaraan di Mahkamah Tinggi, responden/plaintif telah memohon untuk menambahkan perayu sebagai defendan kepada guaman untuk, antara lain, pelanggaran amanah dan berkomplot dengan defendan-defendan pertama hingga kelima dan defendan kelapan untuk menafikan plaintif-plaintif hak mereka ke atas tanah tersebut. Perayu-perayu menentang permohonan tersebut dan menimbulkan isu had masa. Hakim Mahkamah Tinggi telah membenarkan permohonan responde/plaintif untuk menambah perayu-perayu kesembilan hingga kesebelas dalam kes ini. Justeru itu, rayuan ini dikemukakan.

Diputuskan, membenarkan rayuan tersebut:

(1) Seksyen 9 Akta adalah berkaitan pengembalian semula tanah seperti yang tertera pada tajuk yang menyatakan: 'Limitation of actions to recover land'. Seperti dalam penyataan tuntutan pindaan yang dicadangkan, responden-responden tidak memohon untuk mendapat balik tanah tersebut. Mereka hanya memohon ganti rugi. Oleh itu s 9 Akta Had Masa tidak terpakai kepada fakta kes ini yang tidak terkandung sebarang tuntutan untuk mendapat balik tanah (lihat perenggan 12–13).

(2) Tiada konflik atau yang tidak konsisten antara s 22(1) dan s 22(2) Akta. Setiap subseksyen tersebut terpakai untuk suatu set keadaan yang berbeza. Di bawah sub-s (a) kepada s 22(1), perlu wujud elemen fraud atau pelanggaran amanah yang berunsur fraud. Dan di bawah sub-s (b) kepada s 22(1), harta yang diamanahkan hendaklah dalam milik pemegang amanah atau beliau memiliki hasil daripadanya. Meskipun pelanggaran amanah dikatakan telah dilakukan, tiada pengataan dalam cadangan penyataan tuntutan pindaan responden, yang digunakan mengemukakan alasan untuk memasukkan perayu-perayu sebagai pihak kepada tindakan itu, tentang fraud atau tentang melanggar amanah secara fraud. Apabila elemen fraud atau pelanggaran amanh berunsur fraud tidak wujud maka sub-s (a) kepada s 22(1) tidak terpakai (lihat perenggan 16–17).

(3) Untuk mendapat balik harta amanah yang bukan dalam milikan pemegang amanah atau jika wujud pelanggaran amanah akan ternagkum dalam s 22(2) Akta, kecuali jika tindakan yang dimulakan oleh benefisiari bukan suatu kausa tindakan atau keadaan di mana had masa telah ditetapkan oleh Akta untuk memulakan tindakan. Jika suatu tempoh telah ditetapkan, maka tempoh had masa yang ditetapkan dalam Akta akan terpakai. Sebaliknya, ia bermula enam tahun dari tarikh tindakan terakru. Pli had masa hanya relevan kepada cadangan kausa tindakan pertama responden: untuk pelanggaran amanah kerana melepaskan dokumen hak milik. Ini berlaku tahun 1996. Oleh itu masa telah luput untuk responden-responden membetulkan kesalahan melalui tindakan ini terhadap perayu-perayu. Tindakan sebegini akan gagal in limine (lihat perenggan 16–17).

(4) Seksyen 29 Akta tidak terpakai kerana tiada pengataan fraud ditimbulkan dalma kes ini terhadap perayu-perayu dan cadangan tuntutan responden-responden terhadap perayu-perayu juga bukanlah relief akibat kesalahan itu (lihat perenggan 18).

(5) Apabila tuntutan itu berunsur konspirasi maka ia terangkum di bawah tort konspirasi untuk melakukan suatu tindakan yang mengakibatkan kerugian kepada penuntut. Memandangkan cadangan tindakan ini dimulakan selepas tempoh enam tahun, ia juga gagal in limine dalam pli had masa di bawah peruntukan undang-undang (lihat perenggan 19).

Obiter:

Ini hanya merupakan satu permohonan untuk menambah pihak kepada tindakan sedia ada. Ia belum lagi tiba ke peringkat di mana perayu-perayu telahpun menjadi defendan-defendan dalam tindakan tersebut. Oleh kerana bukan pihak kepada tindakan, perayu-perayu tidak diwajibkan memfailkan penyataan pembelaan yang

A sememangnya, jika mereka berbuat demikian, adalah perlu untuk mereka mengemukakan peruntukan relevan Akta yang digunakan. Namun memandangkan mereka belum tiba ke peringkat prosiding ini mereka tidak dikehendaki berbuat demikian kerana A 18 k 8(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 hanya menetapkan bahawa ia perlu dilakukan 'subsequent to a statement of claim' (lihat
B perenggan 21).]

Notes

For cases on defence of limitation, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2382–2384.

For cases on joinder of parties, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue)
C paras 5043–5075.

For cases on limitation, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5454–5458.

Cases referred to

D *Government of Malaysia v Mohamed Amin bin Hassan* [1986] 1 MLJ 224 (refd)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 9(1), 22(1)(a),(b), (2), 29
Rules of the High Court 1980 O 15 r 1, O 18 r 8(1)(a)

E

Appeal from: Civil Suit No MT1–22–33 of 1998 (High Court, Melaka)

Adillah Ahmad Nordin (Andre Wee with him) (Yap Koon Roy & Associates) for the appellants.

F *Patrick Dass (M Visvanathan with him) (Patrick Dass & Co) for the respondents.*

James Foong JCA (delivering judgment of the court):

INTRODUCTION

G

[1] This is an appeal against the decision of the High Court in Malacca which allowed the respondents' application ('the said application') dated 27 July 2004 to add the appellants as the ninth, tenth and eleventh defendant respectively in this case. After hearing submissions, we unanimously allowed this appeal with costs here and
H below and ordered the deposit for this appeal to be refunded to the appellants. Our grounds are as follows:

BACKGROUND

I **[2]** The respondents are plaintiffs in this case. They were, together with some other third parties, totaling 37 in all, registered proprietors of undivided shares in a piece of land held under Grant No 2958 for Lot 579 in the Mukim Ayer Panas in the District of Jasin Meleka ('the said land'). Intending to sell this said land to a company known as Astana Strategi (M) Sdn Bhd ('Astana'), they entered into a written sale and purchase agreement with Astana. Acting for the respondents and some of the

registered proprietors in this sale was the legal firm of Ms Nordin & Phua. The partners of Ms Nordin & Phua at the material time were the appellants in this appeal. The solicitors for Astana were Ms Badaruzaman Chandran & Co ('Ms Badaruzaman'). The partners of Badaruzaman are the sixth and seventh defendant in this action.

[3] With the consent of all parties in this sale and purchase, the document of title to the said land was deposited with Ms Nordin & Phua pending the completion of the sale. Aside from this, all the registered proprietors had also executed respective memorandum of transfer of the said land in favour of Astana. These were deposited with Ms Badaruzaman who were authorized to only deal with them in accordance with the terms of the sale and purchase agreement.

[4] Upon the execution of the sale and purchase agreement, 10% of the purchase price was paid by Astana to the registered proprietors with the balance to be settled within six months from date of the agreement. According to the plaintiffs, Astana failed to pay the balance of the purchase price. Thereupon Ms Nordin & Phua had, on behalf of the respondents, written to Ms Badaruzaman to terminate the sale. Subsequently in 1996, the first to fifth respondents and one other co-proprietor of the said land engaged a different firm of solicitors, Ms Chelva R Suppiah ('Chelva'), to file an action in the High Court in Melaka bearing No 22–13–1996 against Astana to rescind the sale and purchase agreement whilst the sixth and seventh respondents together with two other co-proprietors also in 1996 filed a different action against Astana in the Melaka High Court bearing No 22–90–1996. From the appeal record, these suits were settled by consent between Astana and these respondents on 29 March 2000.

[5] In the meantime, according to the respondents, five co-proprietors of the said land (first to fifth defendant in this case) and a middleman involved with the sale of the said land to Astana (the eighth defendant in this case) had, without the consent and knowledge of the respondents and in breach of trust, obtained the document of title to the said land from Ms Nordin & Phua. They then forwarded it to Ms Badaruzaman who used it together with the duly executed memorandums of transfer in their possession to effect a transfer of the said land to Astana. Once this was done, Astana charged the said land to Southern Finance Bhd as security for loan facilities.

[6] As a result of this, the respondents brought this action originally against the first to eighth defendants alleging primarily deprivation of their interests in the said land and against the eighth defendant for fraud. At the hearing of this case, the third appellant was called as a witness. After his testimony, the respondents decided to add the appellants as defendants to this action. Initially, the respondent's application was without a proposed amended statement of claim indicating the allegations and claims against the appellants. It was subsequently amended to include such a document. The allegations against the appellants are found in paras 44 and 45 of this proposed amended statement of claim. They read as:

> 44. Selanjutnya plaintif-plaintif akan juga menyatakan bahawa defendan kesembilan, kesepuluh dan kesebelas sebagai rakan kongsi firma Nordin & Phua, peguam bagi

A plaintif-plaintif, memegang hakmilik tanah tersebut sebagai pemegang amanah bagi plaintif-plaintif. defendan kesembilan ke defendan kesebelas telah memecah/memungkiri amanah mereka kepada plaintif-plaintif apabila mereka melepaskan hakmilik tanah tersebut kepada defendan pertama kelima dan defendan kelapan tanpa pengetahuan, persetujuan dan/atau kebenaran plaintif-plaintif...

B 45. Selanjutnya dan secara alternative, plaintif-plaintif akan menyatakan bahawa defendan kesembilan, kesepuluh dan kesebelas telah bersubahat dengan defendan pertama, dedua, detiga, deempat, delima dan delapan untuk melucutkan plaintif-plaintif daripada hak mereka dalam tanah tersebut.

C **[7]** In short, the respondents' causes of action against the appellants are: (a) for breach of trust in releasing the document of title and; (b) for conspiracy with the first to fifth defendant and the eighth defendant to deprive the respondents of their rights to the said land where the first to fifth defendant as well as the 8th had given a letter to Ms Nordin & Phua to say "We are the co-owners of the above land. We are asked by the committee to keep the custody of the title.

D

[8] Please release the title to us". For this, the respondents are seeking damages as well as aggravated and punitive damages and costs from the appellants.

E **[9]** The appellants in the court below had strenuously objected to the said application principally on the ground that the respondents' claim against them is statute barred. The learned High Court judge rejected this contention. His reasons are reflected in the following passages of his judgment:

F It was elaborated for intended defendants 8, 9 and 10 that the plaintiffs' application is an afterthought of the plaintiffs' solicitors and is barred by s. 22(2) of the Limitation Act 1953 in that the plaintiffs' cause of action for alleged breach of trust which accrued in 1996 had expired six years later, in the year 2002, relying on *Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 6 (HC); and *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (SC)....

G Intended defendant 11 also urged the court to consider the issue of limitation in the light of ss 22 and 29...

It was contended for the plaintiffs that as against all the intended defendants, the limitation period has not expired as the plaintiffs had just discovered the alleged wrongfulness and breach of trust on the part of the firm, and fraud on the part of intended defendant 11, when Mr Yap Koon Roy, intended defendant 10, gave evidence herein on 16 January H 2003...

It is pertinent to observe that the matter herein concerns land including the recovery of land which may in all probabilities attract the application of s 9 (a) which provides for a limitation period of 12 years from the date the cause of action accrued.

I Upon a true instruction of s 22(1) (a) and (b), read with (2), I am of the view that s 22(1) is the predominant provision which prescribes no period of limitation in an action by a beneficiary coming within the circumstances stated in (a) or (b) therein.

On the other hand, s 22(2) is a subservient provision as it has been made subject to s 22(1). In other words, in the event of a conflict or inconsistency between the two subsections, s 22(2) must in effect give way to s 22(1).

Section 29(a) or (b) effectively postpones the limitation period when the cause of action is based on the fraud of the defendant and time only begins to run when the plaintiff has discovered the fraud: see *Lim Yoke Kong*... A

In my judgment, for the purposes of this application, a reference to the procedural law regulating the special plea of limitation would be illuminating. O 18 r 8(1)(a) expressly provides that a party must in any pleading subsequent to a statement of claim plead specifically, for example, the relevant statute of limitation which he alleges makes any claim of the party not maintainable. B

Hence, the intended defendants' reliance on ss 22 and 29 must be specifically pleaded, which necessarily presupposes that the plaintiffs' statement of claim must contain the essential averments pertaining to the role or participation of the intended defendants in relation to the alleged breach of trust or fraud. These are the procedural steps that the respective parties must first embark upon. C

Thereafter, the issue of limitation is to be determined after an analysis of the respective pleadings, and viva voce evidence of all the parties including the intended defendants at the full trial. That being the case, it is quite impossible for the respective learned counsel to state conclusively that ss 9, 22 and 29 would be applicable or inapplicable. In this regard, I express no view on their applicability in this interlocutory application, but would give a definitive decision thereon in due course at the full trial. D

In the circumstances, I hold that the intended defendants' objection is unsustainable.

OUR VIEWS E

[10] Since there is only one issue in this appeal concerning the defence of limitation, we wish to reiterate from the outset that if an action were to fail in limine upon a plea of limitation against the party intended to be included in an action upon an application made under O 15 r 1 of the Rules of the High Court 1980 ('RHC') then such application should be refused — *Government of Malaysia v Mohamed Amin bin Hassan* [1986] 1 MLJ 224 at p 228. F

[11] On the facts as disclosed, we are of the view that the respondents were aware of the alleged misdeeds of the appellants' way back in 1996. This concerns the release of the document of title to the said land by Ms Nordin & Phua to the first to fifth and eighth defendant where a police report was even lodged. This conduct of the appellants was also pleaded in the respondents' original statement of claim against the first to eighth defendants filed in 27 March 1998. Paragraphs 35(ii) of the original statement of claim announced that, 'based on the false misrepresentation M/s Nordin & Phua released the title deed to the first five defendants'. This clearly indicates that the respondents knew well in advance of this occurrence before the testimony of the third appellant. When they knew of this fact way back in 1996 they could have, if they so desired, mounted an action against the appellants. Even if there is doubt that this knowledge did not extent as far back as 1996 but certainly by the time the respondents filed their action against the first to eighth defendants on 27 March 1998 they knew of this matter. That was more than six years from the date of this said application. If the limitation period of six years were to apply in this case, then this said application ought to be refused. But what is the limitation period applicable here? In order to ascertain this, we examined various pertinent provisions of the Limitation Act 1953 ('the Act'). G H I

[12] The first is s 9 which the learned High Court judge had made reference to in his grounds of judgment. Section 9 of the Act concerns the recovery of land as indicated by the heading which reads: 'Limitation of actions to recover land'. Then in s 9(1) it says:

> (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[13] But in the proposed amended statement of claim, the respondents did not seek for recovery of the said land. They only requested for damages. So it is our view that s 9 of the Act is not applicable to the facts of this case which consist no claim for the recovery of land.

[14] The next section we looked at is s 22 of the Act which reads:

> 22. (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.
>
> (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

[15] Regarding this section of the Act, the learned High Court judge was of the view that sub-ss (1) and (2) of this section is in 'conflict and inconsistent' with each other. He pointed out that when s 22(1) specifies that no period of limitation applies for a claim falling within the circumstances described in s 22(1)(a) and (b), s 22(2) prescribed a limitation period of 6 years for 'an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act'. To resolve this, he considered s 22(2) to be subservient to s 22(1) and therefore 'must in effect give way to s 22(1)'.

[16] We do not share this view of the learned High Court judge for the following reasons: First, we found no conflict or inconsistency between s 22(1) and s 22(2) of the Act. Each of these subsections applies to different set of circumstances. Section 22(1) relates to a claim by a beneficiary: (a) 'in respect of any fraud or

fraudulent breach of trust which the trustee was a party or privy; or (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee converted to his use'. So under sub-s (a) of s 22(1), there must be the element of fraud or fraudulent breach of trust. And under sub-s (b) of s 22(1), the trust property must be in the possession of the trustee or he has in possession of the proceeds thereof. On the other hand, s 22(2) of the Act is only confined to a beneficiary's action 'to recover trust property or in respect of any breach of trust not being an action which a period of limitation is prescribed'. The recovery of trust property here must mean trust property which is no longer in the possession of the trustee since s 22(1)(a) of the Act has already catered for situation where the trust property is in the possession of the trustee. For recovery of trust property which is not in the possession of the trustee or for that matter any breach of trust would fall within s 22(2) of the Act, provided that the action so mounted by the beneficiary is not one of those causes of action or situation where a time limit is already prescribed by the Act to bring the action. If a time is so prescribed, then the prescribed period of limitation specified in the Act will apply. Otherwise, it will be six years from the date on which the action accrued. So from the above observation, the distinction between s 22(1) and s 22(2) of the Act is clear. There is no conflict or inconsistency between the two.

[17] Now applying s 22 of the Act to the facts of our case, we are of the view that this plea of limitation is only relevant to the respondents' proposed first cause of action: for breach of trust in releasing the document of title. The proposed second cause of action, which is one of conspiracy, is covered by a different section of the Act which we will deal with shortly. The first cause of action is certainly founded on the existence of a trust where the appellants are alleged to have committed a breach of this trust. Though breach of trust is alleged to be committed, there is no allegation in the respondents' proposed amended statement of claim, which must be relied on to represent the grounds for inclusion of the appellants as a party to the action, of fraud or for fraudulently breaching the trust. When such elements of fraud or fraudulent breach of trust is absent then sub-s (a) of s 22(1) has no application. Regarding sub-s (b) of s 22 (1), we discovered that the respondents are not seeking under this cause of action for the return of the trust property or the proceeds thereof. They are only demanding damages. So the allegation does not fit any of these factual requirements demanded in this subsection. What is left then is s 22(2) of the Act which, in our view, covers the situation here. The respondents, as beneficiaries of a trust, are proceeding to claim against the appellants for breach of trust, not trust property but for damages, and this is an action where no period of limitation is prescribed by other provision of the Act. In such a situation, the period of limitation is six years from date when the right of action accrued. This was in 1996. Thus, time has lapsed for the respondents to seek redress by this action against the appellants. Such action will fail in limine. When it does, then the said application ought to be refused.

[18] The learned High Court judge has also dwelled into s 29 of the Act which provides for a postponement of the limitation period in case of fraud or mistake. But we wish to reiterate that there is no allegation of fraud ever raised in this case against the appellants and neither is the respondents' proposed claim against the

appellants is for relief from the consequence of a mistake. For this, we disagree with the learned High Court judge's view that this provision of the Act could be applicable to the facts of this case.

[19] We shall now proceed to deal with the respondents' second cause of action: conspiracy with the first to fifth and eighth defendant to deprive the plaintiffs of their rights to the said land. When the claim is one of conspiracy then it falls under the emerging tort of conspiracy to do an act resulting in damage to the claimant. Being a tortuous claim, s 6(1)(a) of the Act has this to say:

> Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort;

Since this proposed action is brought after this period of six years, it would also fail in limine upon a plea of limitation under this provision of the law.

[20] Before we conclude, we like to touch on the concern of the learned High Court judge who felt that relevant provision of the Act must be pleaded in the defence if the appellants were to rely on it. This is required by O 18 r 8(1)(a) of the RHC which says:

> (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;

[21] We wish to point out that we are only dealing with an application to add parties to an existing action. We have not reached the stage where the appellants are already defendants in the action. Not being parties to the action, the appellants are not obliged to file a statement of defence which of course, if they do, it would be necessary for them to disclose the relevant provision of the Act relied on by them. But not having reached this stage of the proceedings as yet they are not required to do so since this rule only stipulates that this is to be done 'subsequent to a statement of claim'. Therefore this rule of the High Court has no application to the circumstances of this case.

CONCLUSION

[22] For the reasons stated above we are of the view that the said application should have been refused on the ground that the proposed action against the appellants would have failed in limine upon a plea of limitation by the appellants. Accordingly we allowed the appeal and ordered as in the opening paragraph of this judgment.

[23] This grounds of judgment has the concurrence of my learned brother, Denis Ong JCA and sister, Zaleha Zahari JCA.

Appeal allowed.

Reported by Anit Kaur Randhawa